STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
Donald S. Owens, P.J., Christopher M. Murray and Michael J. Riordan, JJ.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

LEO DUWAYNE ACKLEY, a/k/a LEO DUANE ACKLEY, JR. and LEO DUWAYNE ACKLEY II,
Defendant-Appellant.
/

SC No. 149479
COA No. 318303
LC No. 2011-003642-FC

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149479
reply

DEFENDANT-APPELLANT'S REPLY BRIEF TO PLAINTIFF-APPELLEE'S BRIEF IN OPPOSITION TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL TO THE MICHIGAN SUPREME COURT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

COURT RULES

This Honorable Court should not consider Plaintiff-Appellee's (hereinafter "Plaintiff") opposing brief because they have failed to comply with MCR 7.302(D). Plaintiff-Appellee's answer was filed late, which clearly violated the rule. However, if this Honorable Court chooses to accept Plaintiff-Appellee's untimely answer, Defendant-Appellant, Leo Ackley, prays this Honorable Court grant his application for leave to appeal, uphold the decision of the trial court granting him a new trial, remand to the trial court for further proceedings, or any other relief this Honorable Court deems just and appropriate.

REBUTTAL TO PLAINTIFF-APPELLEE'S COUNTER STATEMENT OF FACTS

Plaintiff regurgitated 35 pages of facts wherein Plaintiff repeatedly overstated the entire truth in order to portray Leo Ackley as a monster. The simple truth is that no one ever witnessed Leo abuse Bailey. Regardless of whether or not Leo suggested Bailey's behavior should change, all the decisions regarding her development were made by Erica and Leo. Further, Leo had a positive influence in Bailey's life, which was documented by her personal pediatrician; however, and again, trial counsel failed to call him a witness. Further, trial counsel failed to call any expert witness to rebut the prosecutions witnesses, which deprived the jury of a chance to properly analyze the opposing medical views presented at trial. Trial counsel was ineffective and it prejudiced the outcome of the trial.

REBUTTAL TO PLAINTIFF-APPELLEE'S ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN GRANTED DEFENDANT-APPELLANT LEO ACKLEY A NEW TRIAL. TRIAL COUNSEL MADE DECISIONS AFTER LESS THAN COMPLETE INVESTIGATION THAT PREJUDICED LEO ACKLEY AND THOSE DECISOINS CAN NOT BE PRESUMD TRIAL STRATEGY.

Trial counsel proceeded to trial under the theory that Baylee's death was attributable to an accidental fall. Plaintiff's mistake trial counsel's theory of defense for trial strategy. "No one, including the trial judge, questions the fact that trial counsel had a trial strategy—to show that Baylee's death was attributable to accident—and that he pursued that strategy at trial." See Plaintiff-Appellee's Brief at 37. Although the theory of defense was reasonable—accidental fall—trial counsel's strategy pursuing that defense was not.

A. The trial court did not abuse its discretion when it found that trial counsel's representation fell below an objective standard of reasonableness.

Trial counsel had information readily available to him that should have prompted further investigation. Specifically, Dr. Hunter told him in the initial consultation that this was controversial medical science and experts were available to him that would likely be able to testify that Bailey's death was accidental. He went on to refer him to at least one of these alternate medical experts. Counsel's failure to properly investigate his primary defense prejudiced Leo. It adversely affected the outcome, depriving him of a fair trial.

1. There is no basis to support that the decision not to contact an alternate expert was reasonable trial strategy.

In preparation for trial, trial counsel sought out an expert witness and found Dr. Hunter, a specialist in the field of forensic pathology. Counsel sent Dr. Hunter material to review but failed to provide Dr. Hunter with all of the relevant facts.

Dr. Hunter stated at the *Ginther* Hearing:

> The Court: Mr. Marks failed to provide Dr. Hunter with all of the relevant facts including a statement that the victim had fallen off a trampoline and struck her head a few days before she was found unconscious and that she had been complaining of headaches. Is that accurate?
>
> Dr. Hunter: I did not have any materials. He did not give me any materials to suggest that. GIII 17:22-185:21.

Trial counsel testified he was aware of Linda Bryd's testimony prior to trial. GI 32:8 and he stated that his trial preparation with Dr. Hunter "included dealing with events such as that, even though he did not specifically know about a trampoline." See Plaintiff-Appellee's Brief at 38. Additionally, counsel stated Dr. Hunter testified that the trampoline incident did not change his opinion of how Baylee died. Dr. Hunter stated the following at the *Ginther* Hearing regarding the missing material:

> ". . .Now, if you only gave that Affidavit and then what he gave me, it would have supported the information – the idea that I gave him. That you don't now this kid isn't jumping on the bed, so my suggestion or proposing an alternate possibility was in line with this Affidavit, and I had no knowledge of that. GIII 40:21-41:4. . .

At the *Ginther* Hearing Dr. Hunter explained to the trial court that the affidavit *supported* the alternate theories he proposed to trial counsel. However, Dr. Hunter only reviewed a portion of the information that trial counsel knew of and had available to him. Ultimately, Dr. Hunter opined to trial counsel he did not agree with the theory of defense and referred trial counsel to at least one other expert. Trial counsel chose to retain Dr. Hunter, against Dr. Hunter's own advice, and without even attempting to contact either Dr. Spitz or Dr. Shuman or any other expert on accidental falls. Although Dr. Hunter repeatedly told trial counsel he was not the best expert, he assisted counsel as best he could but declined to testify at trial.

Additionally, Plaintiff stated it was his strategic decision not to investigate the medical issue underlying his theory of defense any further. He chose not to conduct any independent research and chose not to present expert testimony at trial. The only witnesses who were qualified to present and interpret the medical evidence to the jury were prosecution experts; consequently the expert medical testimony the prosecution presented at trial was not refuted.

At the *Ginther* Hearing trial counsel stated:

> Q. And so wouldn't you agree that it would have been prudent of you in cross-examining her to be able to impeach those statements with learned treatises that state the exact opposite for example? GI 26:2-26:5.
>
> . . .
>
> Q. For example, a Daubert analysis of Abuse Head Trauma and Shaken Baby Syndrome, by the Houston Journal of Health Law and Policy, would that have been prudent?
>
> A. It may have been prudent, but that's – that wasn't the strategy that I used. GI 26:14-26:18
>
> . . .
>
> Q. Okay. And so it goes back to my question. Wouldn't it have been prudent to impeach that opinion with a learned treatise that would state something to the effect that short falls can cause that type of injury, short – an accidental fall can cause that type of injury?
>
> A. What I used was the discussion with Dr. Hunter in reference to the force necessary, and then my question to her I believe was could this occur by her falling back and hitting the – I believe it was the footboard of the sleigh bed.
>
> Q. Right
>
> A. So that was my strategy there, was using the amount of force that must be present.
>
> Q. Right.
>
> A. Because it – Because with my conversation with Dr. Hunter there should be some type of formula, some type of mathematical way of determining force so that was my questioning to her. GI 29:10-30:3.
>
> . . .

> Q. So again going back to my original question, wouldn't you agree it would have been prudent to impeach that opinion with some type of learned treatise of over – the over 400 available?
>
> A. Again I would say no because it was going by as far as the force argument. GI 30:8-30:13.

Plaintiff repeatedly fails to substantiate trial counsel's failure to not call an expert witness at trial. Trial counsel consistently testified his only concern was to defend the blunt force trauma to support the theory of defense that Baylee died from an accidental fall. Plaintiff continuously confused trial counsel's reasonable theory of defense for his unreasonable trial strategy.

2. Trial Counsel may not rely on the opinion of an expert as a means of substitution for the obligation to undertake a thorough investigation of law and facts relevant to plausible options for a defense.

Plaintiff stated that trial counsel accepted the conclusion reached by Dr. Hunter and developed his trial strategy based around the obvious difficulty Dr. Hunter's opinion proposed to the theory of defense. Trial counsel made the choice to accept Dr. Hunter's conclusion, he was not obligated to do so. "Trial counsel may rely on an expert's opinion on a matter within his expertise when counsel is formulating a trial strategy but this common-sense principle does not give trial counsel a free ride when it comes to the obligation to undertake a 'thorough investigation of law and facts relevant to plausible options' for a defense." *Couch v. Booker*, 632 F3d 241, 246 (CA 6, 2011). (citing *Strickland).* Therefore any difficulty he experienced at trial regarding Dr. Hunter's opinion is the result of an unsupported decision and should not be rewarded by calling it trial strategy. Trial counsel's decision was not strategic; in fact it directly contradicts *Gersten v. Senkowski* 426 F3d 588 (CA 2, 2005).

> "[W]e judge the reasonableness of the purported "strategic decision" on the part of defense counsel "in terms of the adequacy of the investigations supporting" it. . . .Thus, this is not a case where counsel made a reasonable decision to cease further investigation as a result of having discovered that further investigation would have been fruitless. Nor is this a case of "diligent counsel ... draw[ing] a line when they have good reason to think further investigation would be a waste." Because counsel never investigated that alternative approach at all, counsel did not have any reasoned basis to conclude that such an approach would be fruitless.

Plaintiff stated that trial counsel most emphatically did not understand Dr. Hunter to be saying that he needed to consult a different expert for a full understanding and analysis of the facts. See Plaintiff-Appellee's Brief at 39. At the *Ginther* Hearing Dr. Hunter testified in detail regarding each conversation he had with trial counsel.

Dr. Hunter stated at the *Ginther* Hearing:

> "[t]his kind of puts the case in what we call a short fall category. I said I don't think I'm the best person for you. I referred him to a colleague of mine, a doctor Mark Shuman. Who is a forensic pathologist in Florida who is a friend of mine. " GIII 7:18-7:22.

> "I explain to everyone and I'm sure I explained to Mr. Marks why I think Dr. Shuman is the best person. He is a doctor that believes passionately in looking at these things with a critical eye. He doesn't buy into assumptions. He really is a man of science, and that's what I described to Mr. Marks is, he's the guy that's going to give you your best shot at if this is the type of situation I'm not because I'm not a physics guy." GIII 12:15-12:22.

> "So I was giving him angles to defend his client but again even after having said all of that I said you still don't want me as your defense expert. . . . *You really want a defense expert who in – it's almost like a religion. In his or her religion believes this could be a shortfall death because that's going to be your best defense expert and you want someone who is credible. That's why I was steering him Dr. Shuman as opposed to me.*" GIII 23:4-24:2. [Emphasis Added]

Dr. Hunter informed trial counsel that there was at least one available and highly qualified expert who could "create reasonable doubt or turn things into defenses [sic] favor." GIII 11:5-11:6. Trial counsel, however, failed to investigate this or any other

experts, and instead stuck with the one who was "not [his] guy." GIV 52:14. Dr. Hunter clearly referred trial counsel to a different expert. At no point did Dr. Hunter mention that the referred names were specifically in case a need for testimony arose. Trial counsel had no basis to decide that contacting an alternate expert was useless solely because he didn't know exactly what information he would receive. It is not reasonable to infer that a decision is trial strategy when the decision on its face is irrational and for which no justification has ever been produced.

At the status conference both the prosecution and defense agreed that expert testimony was going to be important. GIV 50:4-50:6. Counsel knew the prosecution would call expert witnesses and the weight that expert testimony can hold with a jury. Trial counsel stated at the *Ginther* Hearing:

> Q. So wouldn't you agree that the entire case came down to the opinion of experts?
>
> A. It was totally circumstantial.
>
> Q. You wouldn't agree it all came down to the opinion of experts?
>
> A. No, I would also attach to that as far as whatever inferences the jury wished to make as far as from whatever inferences the jury wished to make as far as from whatever evidence was given.
>
> Q. Like, for example – give me an example.
>
> A. Going on the basis as far as the type of injury that she had – that Baylee had, and the inference being made that that type of injury as far as that type of blunt force was such. Now, in inference to albeit accidental, albeit whether or not Mr. Akly[sic] really did that would be the inference to which they would have to take. Now I understand that they would be listening to as far as Dr. DeJong being that she was the medical examiner.
>
> Q. So her testimony would carry great weight, would you agree with that?
>
> A. Yeah, there's a possibility of that.

Q. Well, that's what you just said, that it came down to conjecture, opinion, it was her opinion, and – correct – she was being the medical examiner, to quote you, right?

A. Correct.

Q. *Okay, so you agree her opinion in your opinion would count for the most?*

A. *Probably.* GI 42:9-43:25.

Although Dr. Hunter verbally advised trial counsel, Dr. Hunter did not prepare a work product for him and counsel did not request one. GI 15:21-15:25. Plaintiff stated the verbal report he received from Dr. Hunter was all that he needed. Dr. Hunter verbally provided trial counsel with sample questions that counsel incorporated into his cross-examination of Dr. DeJong, however, trial counsel's vigorous cross-exam concluded once he exhausted Dr. Hunter's sample questions. Dr. Hunter did not provide sample questions for counsel to use during cross-examination of any of the other *four* expert witnesses.

3. The trial court did not benefit from the use of hindsight in their analysis of trial counsel's ineffective representation. The trial court evaluated counsel's performance based on his conduct and found his representation ineffective.

Plaintiff stated that the trial court benefited from the use of hindsight to analyze his performance when the court "decided Marks should have known what Dr. Spitz or Dr. Shulman[sic] would have opined had he consulted one of them after hearing Dr. Hunter's opinion." See Plaintiff-Appellee's Brief at 42. Counsel's investigatory decisions must be assessed in light of the information known at the time of the decisions, not in hindsight. *Strickland v Washington*, 466 US 668, 680; 104 S Ct 2052, 2060; 80 L Ed 2d 674 (1984). *If* the trial court had made such a statement it would be difficult to argue that the court did

not use hindsight analysis. However, the trial court never stated that trial counsel should have known what Dr. Spitz or Dr. Shuman would have opined. After a thorough analysis of the facts, the law and analogous cases the trial court held that trial counsel was ineffective because the decision not to contact at least one of the known alternate experts was not reasonable trial strategy. The trial court thoroughly analyzed trial counsel's conduct and reasoning, or in the case at hand lack there of, behind trial counsel's decisions. Counsel's conduct and his performance at the time of trial deprived Mr. Ackley of a substantial causation defense.

B. The Trial court did not abuse its discretion when it found that trial counsel was ineffective and that counsel's ineffective representation prejudiced Mr. Ackley.

The significance of the medical evidence to the jury's determination of Leo's guilt or innocence made an expert necessary in this case. Plaintiff stated that if trial counsel had retained Dr. Spitz, "at best he would have created a would create[sic] a battle of the experts." See Plaintiff-Appellee's Brief at 44. However, if the defense had offered testimony from Dr. Spitz or a similar expert the jury would have been presented with a competing medical opinion, and the jury would have been required to weigh the opinion of each qualified expert.

1. The trial court applied the Strickland two prong test and properly analyzed the second prong finding that Mr. Ackley was prejudiced by counsel's ineffective representation.

Plaintiff stated that the trial court did not properly address the second prong of the *Strickland* test. Plaintiff argued that the trial court concluded its discussion of prejudice in one conclusory statement. "[A]nd especially when you look at Dr. Spitz's opinion it is directly contrary to the prosecutor's theory and the evidence presented." See Plaintiff-

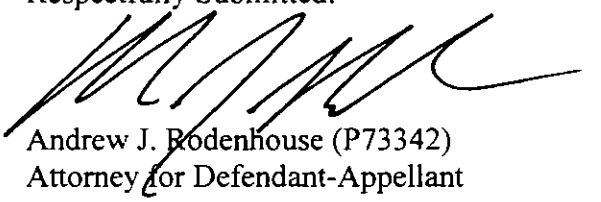
Appellee's Brief at 44. Contrary to the Plaintiff's argument that the trial court's conclusion went "unsupported by reference to the evidence"; the trial court thoroughly analyzed the second prong of the *Strickland* test. GIV 60:8-60:21. Trial counsel's conduct fell below an objective standard of reasonableness, and that failure prejudiced Leo, to the point of effectively negating trial counsel's only presented defense—accidental death.

C. The Trial Court correctly analyzed the cases underpinning its grant of a new trial.

The trial court could not abuse its discretion by choosing to follow case law, as the Plaintiff argue are merely persuasive precedent, when the Plaintiff failed to present any case law to the contrary to support its position. Plaintiff offered *People v. Eliason*, 300 Mich App 293; 833 NW2d 357 (2013) as contrary authority. *Eliason* involved an ineffective assistance of counsel claim that Plaintiff claimed is squarely on point with the facts of the case at hand. However, *Eliason*'s trial counsel decided not to seek out a *fourth* expert witness when the first three he consulted did not indicate the defendant suffered from an underlying mental health condition. *Eliason*'s trial counsel did not settle for the first expert he spoke to and vigorously searched for an expert without an opposing view. Most importantly, the alternate experts were not previously known to him through a recommendation or a referral. If only Leo's trial counsel had tried as hard as *Eliason*'s.

Therefore Leo prays this Honorable Court grant his application for leave to appeal.

Respectfully Submitted:



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